

BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

State of Washington DEPARTMENT
OF ECOLOGY,

Appellant,

v.

CITY OF BELLINGHAM; DAVID
EDELSTEIN and JERRY HAMMER,

Respondents.

SHB No. 89-2

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a substantial development permit issued by the City of Bellingham for the placement of 5,000 cubic yards of fill, came on for hearing before the Board: Wick Dufford, Presiding; Judith A. Bendor, Chair; Gordon Crandall, and Robert Schofield. Harold S. Zimmerman has reviewed the record.

The hearing began in Bellingham on May 11, 1990. A second day of hearing was held in Lacey on May 29, 1990. Final briefing was submitted to the Board on June 15, 1990. Board deliberations were held in temporary abeyance pending the parties' post-hearing efforts to settle the case.

At the hearing appellant was represented by Allen T. Miller, Jr., Assistant Attorney General. Respondent Bellingham was represented by Dawn Sturwold, Assistant City Attorney. Respondents Edelstein and Hammer were represented by Mark B. Packer, Attorney at Law. The proceedings were reported by Suzanne P. Navone (May 11), Rhonda G.

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1 Jensen (testimonial deposition of William T. Geyer), and Kathryn A.
2 Beehler (May 29).

3 Witnesses were sworn and testified. Exhibits were admitted and
4 examined. Argument was made. From the testimony heard, exhibits
5 examined, and arguments made, the Board makes the following:

6 FINDINGS OF FACT

7 I

8 In September of 1988, David Edelstein and Jerry Hammer jointly
9 applied to the City of Bellingham for a substantial development permit
10 to fill five acres of land on shorelines adjacent to Squalicum Creek.
11 The application identified the proposed use of the property simply as
12 "industrial development."

13 II

14 Under "nature of the existing shoreline," the application's entry
15 read: "floodplain, low bank, mud." There was no identification of
16 the project site as a "marsh, bog or swamp."

17 III

18 Along with the shoreline substantial development application a
19 "fill and grade" permit was sought. An environmental checklist was
20 prepared in connection with both applications. The checklist
21 described the proposed development as follows:

22 *Fill and Grade approximately 5000 cubic yards over an*
23 *area of 5 acres.*
24 *Property is zoned for future development as Planned*
Industrial.

1 The question asking for a description of the purpose, type and
2 approximate quantities of any filling was answered: "Uniformly fill
3 over entire area one foot." The source of the fill was not
4 indicated.

5 Where an approximation of the percent of the site to be covered
6 with impervious surface was called for, the checklist response was:
7 "Any future development will be done in accordance with zoning code."

8 The question asking whether there is surface water or a wetland
9 in the immediate vicinity was answered with "Squalicum Creek." No
10 identification of the site as involving a "marsh, bog or swamp" was
11 provided. Indeed the request for an estimation of the amount of fill
12 to be placed in wetlands was answered, "none."

13 IV

14 A Determination of Non-Significance (DNS) was issued by the City
15 of Bellingham in connection with the project and circulated to
16 agencies with jurisdiction and expertise. November 1, 1988 was
17 designated as the deadline for submission of agency comments. On that
18 date, the Department of Ecology responded, in part:

19 *It is difficult to evaluate the project without a*
20 *detailed site plan or location map. We would*
21 *appreciate a copy of the site plan or a more accurate*
22 *location to the nearest quarter-quarter section,*
23 *township, and range. Once we receive this information,*
24 *we may have comments on the project.*

1 The record does not disclose any further exchange of information
2 relative to compliance with SEPA (State Environmental Policy Act).

3
4 V

5 The application was referred to the City's Shoreline Committee
6 which was provided with a report by the City's planning staff. The
7 project description set forth in the report is as follows:

8 The applicant, David Edelstein, requests approval to
9 place 5,000 cubic yards of fill material adjacent to
10 Squalicum Creek. The fill will be located on the north
11 side of the creek and north of the old railroad grade
12 between Hannegan and Irongate Roads. It will be at
13 least fifty feet from the creek at all locations.

14 The staff discussion of the project reads in its
15 entirety:

16 The site is identified in the 1974 Drainage Atlas as
17 an area where standing water occurs on a seasonal
18 basis. It is located within the flood plain of
19 Tributary "W" of Squalicum Creek. The 1988 City of
20 Bellingham Wetlands Database indicates the site may be
21 a wetland in accordance with the National Fish and
22 Wildlife Service definition, but no field work was
23 completed in the area to verify this information.

24 Presently, there are no local policies or regulations
25 regarding development on wetland areas. The Open Space
26 plan does state that marshes associated with Squalicum
27 Creek should be used for recreation and public access
purposes, but no specific direction is given as to
where these marshes are located or that development
should be prohibited. The placement of fill is a
permitted activity at this site. The Public Works
Department has reviewed the application and has no
objections provided that a drainage ditch is maintained
sufficient to carry water off the site. The Open Space
Plan does anticipate construction of a trail along the
creek at this location. An easement for the trail is
needed.

VI

On December 5, 1988, Bellingham issued a substantial development permit to David Edelstein and Jerry Hammer. The development was described as "placement of 5,000 cubic yards of fill." Nothing was said about the ultimate use of the property.

A single condition was imposed, as follows:

1) *Drainage Channel adjacent abandoned railroad grade shall be maintained so as not to obstruct the natural flow of flood waters.*

The City's letter of transmittal, accompanying the issued permit, contained the following:

Please remember that the Shoreline Committee discussed at length the public access requirements of this site. Although they recognize a need for access adjacent to Squalicum Creek, it was their recommendation that this issue could be better dealt with as part of the shoreline permit for the building. . . .

VII

The project site is located in an area designated "Conservancy I" under the Bellingham Shoreline Management Master Program.

The parcel is situated north of Sunset Drive in the northeast section of the city limits. Until recently, the property was thickly forested--and undeveloped except for a raised berm traversing the southern edge, formerly a railroad track bed. Squalicum Creek roughly parallels the south side of the railroad berm. The parcel is all within the creek's 100 year floodplain.

VIII

Just beyond the project site to the north, is the boundary of the 100 year floodplain, and in this direction on higher ground some industrial development has occurred over the past few years on property that was formerly covered with forest. Paralleling the northern boundary of the site is a sanitary sewer installed in anticipation of further industrial development.

To the west and south of the project area, the landscape remains in dense deciduous forest.

IX

Prior to the processing of the instant shoreline substantial development permit, the project site was cleared of trees and shrubs. In March of 1988, the Washington State Department of Natural Resources issued a forest practices permit authorizing the clearing of the parcel for the purpose of conversion of the property to non-forest use. The permit application called for a "detailed definition describing the converted use." The response given was: "This area will be used for Planning Industrial Zoning According to the current Comprehensive Plan."

The City of Bellingham was notified of the forest practices permit, and, while expressing some concern for potential flooding and water quality impacts, made no objection to the clearing operation.

When the shoreline permit was issued in early December 1988, the

1 site was no longer forested, but presented a scene of flat open space
2 containing several large slash piles of vegetation residues.

3 X

4 In late December 1988 after the shoreline permit was granted,
5 Washington State Department of Ecology personnel inspected the site
6 and found ponded water and saturated soils throughout the site, with
7 the exception of the piles of cleared vegetation. On January 6, 1989,
8 Ecology filed a Request for Review of the permit with this Board.

9 Thereafter, the parties entered into protracted negotiations.
10 Ultimately these failed to resolve the dispute and the matter was
11 brought on for hearing.

12 Prior to hearing, representatives of the parties did further site
13 inspections in late March and April of 1990 in order to evaluate how
14 to characterize the property at the present time. When these
15 inspections were commenced, the 1990 growing season was already at
16 least three weeks old. The months of heaviest precipitation had
17 passed.

18 XI

19 The Bellingham Shoreline Management Master Program contains no
20 definition of "marshes, bogs, and swamps."^{1/} However, in WAC

21
22 ^{1/} The Shoreline Management Act describes all areas within 200 feet
23 of the ordinary high water mark of streams as "wetlands", whether
24 "wet" in fact or not. RCW 90.58.030(2)(f). The term "marshes, bogs
25 and swamps" is used in the Act and its implementing regulations to
26 denote "wetlands" which meet biophysical criteria.

1 173-22-030(5) Ecology has defined these terms as follows:

2 "Marshes, bogs and swamps" are lands transitional
3 between terrestrial and aquatic systems where
4 saturation with water is the dominant factor
5 determining plant and animal communities and soil
6 development. For the purposes of this definition,
7 these areas must have one or more of the following
8 attributes:

9 (a) At least periodically, the land supports
10 predominately hydrophytes; and for

11 (b) The substrate is predominately undrained
12 hydric soil.

13 Hyrdrophytes include those plants capable of
14 growing in water or on a substrate that is at least
15 periodically deficient in oxygen as a result of
16 excessive water content. Hydric soils include
17 these soils which are wet long enough to
18 periodically produce anaerobic conditions thereby
19 influencing the growth of plants.

20 XII

21 We find that, at least periodically, the project site supports
22 predominately hydrophytic plants. We find further that the substrate
23 of the site is predominately hydric soil.^{2/}

24 On the record, we cannot and do not find that previous
25 disturbances of the natural site--the land clearing, the railroad
26 berm, the drainage ditches have so altered conditions as to remove the
27 site from the "marsh, bog and swamp" category.

28 ^{2/} We limit our findings to those factors listed in the state
29 definition of "marshes, bogs and swamps." We offer no opinion as to
30 whether the property fits the federal definition used in connection
31 with administration of Section 404 of the Federal Clean Water Act.

XIII

Prior to the clearing of the parcel, the site was a part of a larger biophysical wetland, of which the forested areas to the immediate west and south are still a part--with an overstory of alder and big leaf maple, a shrub layer including salmonberry, showberry, Indian plum and ninebark, and an understory including reed canary grass, sedge and water buttercup.

As such, it played a part in performing wetland functions, such as wildlife habitat, water filtration and flood and stormwater retention.

XIV

We find that the clearing of the parcel and the proposal to place fill material on it are a part of a larger overall development intent which ultimately envisions the construction of some sort of project involving buildings and some sort of use consistent with the industrial zoning of the property.

The particulars of the ultimate development are being left to a future contracting process pursuant to the zoning ordinance, to be accompanied by another substantial development permit. The effect of this approach is to fragment the evaluation of project impacts, so that a comprehensive consideration of the alteration of the site from forested wetland to a specific industrial activity is not available at any point in the shorelines process.

XV

The land clearing, though incidental to the overall development, was not included at all in any substantial development permit approval process. In connection with the instant permit for filling, the land clearing was simply treated as a fait accompli.

XVI

The proposed filling of the property has been treated as though it were an end in itself and not as merely incidental to the larger development aim. No description, (either conceptual or schematic diagram), of the ultimate build-out and use of the property was presented to the City prior to approval of the permit to fill.

The application did not describe any structures; it did not specify any ongoing use activity, it did not show where structures will be placed on the property; it did not specify size, color or building materials; it did not identify landscaping plans, amount of impervious surface, or drainage features. The source and nature of the fill to be used was not revealed.

XVII

Our record does not show that any consideration was given to the precedential effect of approving this post-clearing fill or to the cumulative affect of approving additional request for like actions in the area.

1 XVIII

2 Any Conclusion of Law which is deemed a Finding of Fact is hereby
3 adopted as such.

4 From the foregoing Findings of Fact, the Board reaches the
5 following:

6 CONCLUSIONS OF LAW

7 I

8 We review substantial development permits for consistency with
9 the applicable master program and the provisions of Chapter 90.58 RCW,
10 the Shoreline Management Act of 1971. RCW 90.58.140(2)(b). The
11 applicable master program is the Bellingham Shoreline Management
12 Master Program, adopted as a state regulation by Ecology pursuant to
13 RCW 90.58.120. WAC 173-19-4501.

14 II

15 We conclude that the project site fits within the definition of
16 "marshes, bogs and swamps" as set forth in WAC 173-22-030(5).

17 III

18 We conclude that the instant permit does not describe the
19 permittee's proposed project and use in sufficient detail to allow us
20 to carry out the statutory review obligation imposed by RCW
21 90.58.140(2)(a). The permit is too vague for this Board to ascertain
22 the extent to which the development conforms with the policies of the
23 Shorelines Act. Hayes v. Yount, 87 Wn.2d 280, 552 P.2d 1038 (1976).
24
25
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IV

We conclude that the application and accompanying documents were insufficient to inform the City adequately to perform an evaluation of shoreline law consistency. In this regard, the state regulation on permit applications was not met. See RCW 90.58.140(3).

The application failed to comply with those provisions of WAC 173-14-110 which specifically call for project diagrams; including a site plan containing structural details, the source and composition of any fill, and the location of proposed utilities.

While we do not think it is necessary to provide precise construction specifications in a substantial development permit application, sufficient information on project features must be provided to permit approving and reviewing bodies to evaluate the shorelines impacts; for example, the effects on water quality and quantity of changed patterns and composition of runoff, or the effects on major flood flows and stream regimen of building in the floodplain. Without some project details, it cannot be known whether a development is designed in a manner "to minimize, insofar as practical" any shoreline damage. RCW 90.58.020 (fifth paragraph).

V

We conclude that the application, in failing to describe the ultimate on-site activity, did not conform with the provision of WAC 173-14-110 which explicitly calls for a specific description of the proposed use of the property.

1 Unless what is to be done on the property is known, there is
2 simply no way to evaluate whether the proposal at hand is a
3 "reasonable and appropriate" use, given the policies favoring
4 preservation of natural shorelines and shoreline-dependency of allowed
5 uses. See RCW 90.58.020 (second and fourth paragraphs).

6 VI

7 We are further persuaded that the environmental assessment which
8 accompanied the permit application was inadequate to constitute even
9 prima facie compliance with the procedural requirements of SEPA,
10 chapter 43.21C RCW. See Sisley v. San Juan County, 89 Wn.2d 78, 569
11 P.2d 712 (1977). The DNS was issued without the full disclosure of
12 environmental information required by law. As part of the remand of
13 this permit, the SEPA process has to be re-done.

14 Respondent permittee argues that Ecology should not be able to
15 raise a SEPA issue. We conclude that the proposal was so fragmented
16 and the environmental checklist so inadequate, that this argument is
17 simply without merit. To fail to address SEPA during remand would
18 further contribute to fragmentation.

19 VI

20 A major objective of the Shoreline Act is to "prevent the
21 inherent harm in an uncoordinated and piecemeal development of the
22 state's shorelines." RW 90.58.020 (first paragraph).

1 We conclude that the procedure followed here--which excluded the
2 land clearing, included the filling only, left the rest of the project
3 to a separate permitting action further down the road, and did not
4 look at potential cumulative impacts--is the kind of compartmentalized
5 process the Act was intended to eliminate.

6 The step-at-a-time approach means that after each step the
7 developmental outcome becomes more inevitable. Whether this outcome
8 is inappropriate in shorelines terms may not be known until the
9 environment is so changed that there is no reasonable turning back.
10 The Shoreline Act is designed to substitute a comprehensive look at
11 projects at the outset for fragmented decisions which result in the
12 nibbling away of shorelines resources in little bites.

13 VIII

14 Moreover, the instant permit process clearly violated the policy
15 (p. 8) and use regulation (p. 46) of the Bellingham Shoreline Master
16 Program which states:

17 *Cutting of trees of greater than six inches in*
18 *diameter at the base which is incidental to a*
19 *Substantial Development Permit shall require approval*
as part of said permit.

20 IX

21 The problem with the permit process followed in this case is
22 exacerbated by the status of the site as a "marsh, bog or swamp."

23 Determining whether a development should go forward, consistent
24 with the applicable master program and the policies of the Act,
25
26

1 requires not only knowing what is proposed to be done, but also
2 knowing what is going to be lost. Both the master program and the Act
3 speak to environmental protection as well as to shoreline development.

4 Here it is clear that a rigorous analysis of the value and
5 function of this neighborhood as a biophysical wetland is needed,
6 before any use which eliminates or severely compromises the natural
7 system is authorized.

8 X

9 With the present permit, all this Board knows is that approval
10 has been given to fill the property. So far as we have been advised,
11 the developers are free to complete the filling and then do nothing
12 further with the property. We conclude, as a matter of law, that a
13 project which is limited to the filling of a "marsh, bog or swamp" is
14 a violation of the policies enunciated in RCW 90.58.020.

15 For those policies to be met a use favored by the Act must be
16 contemplated and that use must not be outweighed by the environmental
17 consequences.

18 XI

19 Similarly, it cannot be determined whether there is consistency
20 with the Bellingham Shoreline Master Program until more is known about
21 both the development planned and the environment affected.

22 The Use Activity policies for "Landfill" include as the first
23 listed policy that "landfill on the shorelines of the City must
24
25
26

1 contribute to the attainment of Master Program Goals." (p. 13).

2 These goals include elements on shoreline use, economic development,
3 public access, circulation, recreation, conservation and history and
4 culture. It is not possible to know how any of the program's stated
5 goals will be advanced by the permitted landfill in question. For
6 example, the first economic development goal (p. 3) is to:

7 *Provide for economic activity and development activity*
8 *and development of water dependent uses and permit*
9 *water related uses in appropriate locations, consistent*
with environmental goals.

10 The conservation goal (p. 5) is to:

11 *Preserve, protect and restore shoreline areas to*
12 *optimize the support of wild, botanic, and aquatic*
life.

13 Nothing in the record shows how the instant permit contributes to the
14 attainment of either one of these goal statements.

15 XIII

16 The insufficiency of the application and the permit obliges us to
17 remand this matter to the City for reconsideration. We recognize that
18 because the land clearing has been done, the failure to consider it in
19 a substantial development permit makes it more difficult to rectify.
20 While the Shoreline Act does not explicitly mandate offsetting
21 mitigation, See Portage Bay - Roanoke Park Community Council v.
22 Shorelines Hearings Board, 92 Wn.2d 1, 593 P.2d 151 (1979), permitting
23 and reviewing agencies have authority in appropriate circumstances to
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25
26

1 require mitigation as a permit condition, See San Juan County v.
2 Department of Natural Resources, 28 Wn.App. 796, 626 P.2d 995 (1981).

3 The purpose of the remand is to require that a more complete
4 application be submitted, and that the City consider more fully the
5 environmental consequences of whatever is proposed.

6 XIV

7 Any Finding of Fact which is deemed a Conclusion of Law is hereby
8 adopted as such.

9 From these Conclusions of Law, the Board enters this:

ORDER

The substantial development permit issued by the City of Bellingham to David Edelstein and Jerry Hammer for the placement of 5,000 cubic yards of fill is remanded to the City for reconsideration and action consistent with the foregoing opinion.

DATED this 25th day of September, 1990.

SHORELINES HEARINGS BOARD

Wick Dufford 8/31/90
WICK DUFFORD, Presiding

Judith A. Bendor
JUDITH A. BENDOR, Chair

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Member

Gordon F. Crandall / by JB/
GORDON F. CRANDALL, Member

Robert C. Schofield / by JB/
ROBERT C. SCHOFIELD, Member